

No. 13-1572 BN



### **Findings of Fact**

1. Lueckel was licensed by the Board as an RN. Her license was current and active at all relevant times.
2. In June, 2012, Leuckel was employed by Ste. Genevieve County Memorial Hospital (“the Hospital”).
3. On June 27, 2012, the Hospital received an anonymous phone call alleging that Leuckel had diverted drugs. At the end of Leuckel’s shift, the director of medical surgical nursing, Hirshell Parker, asked her to submit to drug testing. Leuckel had already clocked out.
4. Leuckel left the hospital for about fifteen minutes. She went to her car to smoke, then returned for the drug test.
5. Before providing a urine sample, Leuckel told Parker and the Hospital’s human resources director that her urine sample might be positive for marijuana because she had smoked it about two weeks previously.
6. When Leuckel smoked marijuana on that occasion, she was not scheduled to work at the Hospital for the next two days.
7. Marijuana is a controlled substance. Section 195.017.2(4)(w), RSMo Supp. 2013. Leuckel had no prescription for it.
8. On July 5, 2012, Leuckel reported herself to the Board. In her report, she stated she had been “slightly noncompliant” with the Hospital’s drug testing protocol, that she had smoked marijuana approximately two weeks before the drug test, and that her urine sample was positive for marijuana.



## Conclusions of Law

We have jurisdiction to hear this case. Sections 335.066.2 and 621.045.<sup>1</sup> The Board bears the burden of proving that Lueckel's license is subject to discipline by a preponderance of the evidence. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App. W.D. 2012)(dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not." *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)). This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App., W.D., 2001).

## Evidentiary Objections

Leuckel makes a number of objections to the Board's evidence, most of which we sustain. The Board relied on Exhibit A, the affidavit of its executive director with a copy of the report compiled by its investigator and the attachments to the report, which include copies of hospital policies. We admitted Exhibit A pursuant to § 536.070(10). But as Leuckel points out, most of the contents are hearsay, and some are irrelevant. Leuckel timely objected to them.

However, we do rely on two documents contained within Exhibit A: Leuckel's July 5, 2012 self-report to the Board, and her later statement to the Board. Leuckel argues that we should not take notice of them because the Hospital violated her rights to due process in the execution of its drug test. But we do not superintend the Hospital's procedures, and this is not a criminal case. For an admission by a party-opponent to be admissible: 1) the statement must be a conscious or voluntary acknowledgment by a party-opponent of the existence of certain facts;

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<sup>1</sup> In its complaint, the Board cited the RSMo 2000 version of the disciplinary statutes. In her brief, Leuckel cites the RSMo Supp. 2013 version. We cite the RSMo Supp. 2011 – the statutes in effect at the time of Leuckel's conduct -- unless otherwise noted.



2) the matter acknowledged must be relevant to the cause of the party offering the admission; and 3) the matter acknowledged must be unfavorable to or inconsistent with the position now taken by the party-opponent. *Anglin Engineering Co. v. J.E. Barry Co., Inc.*, 912 S.W.2d 633, 639 (Mo.App. E.D.1995). All these factors are met here. Leuckel's own statements are admissions of a party opponent that may properly be used against her.

Leuckel also objects to Exhibit B, a "certificate of authenticity of hospital records" from the Hospital with purported drug test results. She objects to them on the basis of hearsay and points out that the custodian's affidavit states that the records "are true and correct records of the hospitalization of said patient from 6/27/2012." Again, we admitted the exhibit at the hearing as a record of the Board, but we do not rely on it. We make no finding that Leuckel had a positive drug test, only that she reported to the Board that she had a positive drug test and had smoked marijuana.

#### Cause for Discipline

The Board alleges that there is cause for discipline under § 335.066:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or his certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use or unlawful possession of any controlled substance, as defined in chapter 195, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

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(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;



\* \* \*

(12) Violation of any professional trust or confidence;

\* \* \*

(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

Use of Controlled Substance/Violation of Drug  
Laws – Subdivisions (1) and (14)

Leuckel argues that §§ 335.066.2(1) and (14) are unconstitutionally vague, ambiguous, and overbroad. We lack authority to decide such constitutional issues. *Sprint Communications Co., L.P. v. Director of Revenue*, 64 S.W.3d 832, 834 (Mo. banc 2002); *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999). Leuckel has raised the issue and she may argue it before the courts if necessary. *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222 (Mo. App., W.D. 1993).

The parties disagree as to whether the first clause of § 335.066.2(1)—“Use or unlawful possession of any controlled substance, as defined in Chapter 195,” is modified by the final clause —“to an extent that such use impairs a person’s ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096[.]” or whether the final part modifies only the phrase that intervenes, “or alcoholic beverage[.]” We are aware of no appellate decision specifically addressing this point, and the parties point to none.

A statute should be read to effect the intent of the legislature, starting with the plain language used. *United Pharmacal Co. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 909-911 (Mo. banc 2006). It should also be read to give effect to all words and phrases, and to reject an interpretation that would cause a part of the statute to be ignored. *Koetting v. State Bd. of Nursing*, 314 S.W.3d 812, 820 (Mo. App., W.D. 2010).



In prior decisions,<sup>2</sup> we have concluded that the best reading limits the final clause of § 335.066.2(1), concerning impairment, such that it modifies only the intervening phrase, “or alcoholic beverage,” and not the first and more removed clause, “[u]se or unlawful possession of any controlled substance, as defined in Chapter 195[.]” Under this reading, the demonstration of use or unlawful possession of a controlled substance, without demonstration of impairment, establishes cause for discipline.

We acknowledge, however, that § 335.066.2(1) is difficult to construe. Under the reading described above, *any* use of a controlled substance – not just an illegal use – would be cause for discipline. Such a reading would be absurd, leading to the conclusion that a nurse who had been prescribed a controlled substance for pain relief or insomnia would be subject to discipline.

On the other hand, it is also problematic to read the final clause —“to an extent that such use impairs a person’s ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096” – to modify the first clause of subdivision (1) in its entirety. Such a reading would ignore or render nonsensical the words “or unlawful possession.”

We conclude that the best reading of § 335.066.2(1) is the one that gives effect to all the words in the statute without producing an absurd result. Under this reading, unlawful possession of a controlled substance is cause to discipline a nurse, as is use of either alcohol or a controlled substance to the extent that such use impairs the nurse’s ability to perform the work of his or her profession. But legal use of a controlled substance without evidence of impairment of the nurse’s ability to perform the work of the profession is not cause for discipline.

Such reading best effects the purpose of this disciplinary statute—to protect the public. *Koetting*, 314 S.W.3d at 819-820 (examining purpose of § 335.066.2); *see also United*

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<sup>2</sup> *See, e.g., Missouri State Board of Nursing v. Elisabeth Ann Putnam*, case no. 11-1441 BN (July 3, 2013).



*Pharmacal*, 208 S.W.3d at 911-912 (when statute is unclear, court should “consider the problem [it] was enacted to remedy”). Under this reading, Leuckel is subject to discipline, because when she smoked marijuana without having a prescription for it, she unlawfully possessed it pursuant to § 195.010(34) (“A person has actual possession if he has the [controlled] substance on his person or within easy reach and convenient control”), § 195.202.1 (“Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance”) and § 195.180, RSMo 2000 (“A person may lawfully possess or have under his control a controlled substance if such person obtained the controlled substance directly from, or pursuant to, a valid prescription or order of a practitioner”). Such unlawful possession is cause for discipline under § 335.066.2(1). For the same reasons, Leuckel is also subject to discipline under § 335.066.2(14).

We are aware that subsections (1) and (14) of § 335.066.2 overlap to a degree, inasmuch as the latter provides for discipline of a licensee who violates “the drug laws or rules or regulations” of this or any state, or the federal government. But our construction of subsection (1) does not render subsection (14) superfluous. Subsection (1) addresses violations of Chapter 195 as well as impairment caused by consumption of alcohol. Subsection (14) goes further, covering not only Missouri laws contained in Chapter 195, but Missouri laws that may be contained in other chapters of the Revised Statutes; Missouri rules and regulations; and the rules, regulations, and laws of any other state or the federal government.

The Board has demonstrated cause for discipline under § 335.066.2(1) and (14).

#### Professional Standards – Subdivision (5)

The Board alleges that Lueckel’s conduct constitutes misconduct, misrepresentation, and dishonesty in the performance of her functions and duties as an RN because her use of marijuana violated the facility’s drug-free workplace policy, and because she was not fully compliant with



the facility's drug testing policy in that she left the facility for fifteen minutes after she was asked to report to give the urine sample.

Misconduct means "the willful doing of an act with a wrongful intention[;] intentional wrongdoing." *Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524 (Mo. App. E.D. 1988). A misrepresentation is a "falsehood or untruth made with the intent of deceit rather than an inadvertent mistake." *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W. 2d 894, 899, n. 3 (Mo. App. W.D. 1997). Dishonesty is a lack of integrity or a disposition to defraud or deceive. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 650 (unabr. 1986). In order to be subject to discipline for any of these under § 335.066.2(5), the conduct must have been "in the performance of the functions or duties" of a nurse.

Section 335.016(15) defines "professional nursing" as:

the performance for compensation of any act which requires substantial specialized education, judgment and skill based on knowledge and application of principles derived from the biological, physical, social and nursing sciences, including, but not limited to:

- (a) Responsibility for the teaching of health care and the prevention of illness to the patient and his or her family;
- (b) Assessment, nursing diagnosis, nursing care, and counsel of persons who are ill, injured or experiencing alterations in normal health processes;
- (c) The administration of medications and treatments as prescribed by a person licensed by a state regulatory board to prescribe medications and treatments;
- (d) The coordination and assistance in the delivery of a plan of health care with all members of a health team; [and]
- (e) The teaching and supervision of other persons in the performance of any of the foregoing[.]



The record indicates that Leuckel smoked marijuana when she was off duty and not scheduled to work again for two days. There is no suggestion that she worked under the influence of the drug. Under these facts, we cannot conceive of how the incident could be considered to have been in the performance of the functions or duties of a nurse as set forth above. And while Leuckel briefly left the Hospital before submitting herself to drug testing, we likewise cannot conclude that her departure was “misconduct” for two reasons. First, conduct that is prohibited by an employer’s policy is not necessarily misconduct in the performance of the functions or duties of a profession. Second, there is no competent evidence of the Hospital’s policies in evidence.

Leuckel is not subject to discipline under § 335.066(5).

#### Professional Trust – Subdivision (12)

The phrase “professional trust or confidence” is not defined in Chapter 335. Nor has the phrase been defined in the case law. Absent a statutory definition, the plain meaning of words used in a statute, as found in the dictionary, is typically relied on. *E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011). The dictionary definition of “professional” is

of, relating to, or characteristic of a profession or calling...[;]...  
engaged in one of the learned professions or in an occupation  
requiring a high level of training and proficiency...[;  
and]...characterized or conforming to the technical or ethical  
standards of a profession or occupation....

WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1811 (1986). “Trust” is

assured reliance on some person or thing [;] a confident  
dependence on the character, ability, strength, or truth of someone  
or something...[.]

*Id.* at 2456. “Confidence” is a synonym for “trust.” *Id.* at 475 and 2456. Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]” *Id.* at



2456. Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]” *Id.* Therefore, we define professional trust or confidence to mean reliance on the special knowledge and skills that professional licensure evidences.

Again we note that the record is devoid of any evidence that Leuckel worked under the influence of marijuana, or that her intake of the drug impaired her professional knowledge or skills in any way. Although Leuckel was, in her own words, “slightly noncompliant” with the Hospital’s drug testing policy, there is no evidence that the minor incident of noncompliance impinged upon her nursing knowledge or skills, or thwarted the expectations of her patients or colleagues that she perform her nursing duties professionally.

Lueckel is not subject to discipline under § 335.066.2(12).

#### Leuckel’s Other Arguments

Leuckel argues that she should not be subject to discipline because public consensus on the dangers and health risks of marijuana has shifted considerably, and a number of states have liberalized their laws regarding possession and use of small amounts of marijuana. Although that may be true, at this time Missouri is not one of those states, and this Commission has no authority to disregard the law. *See Lynn v. Director of Revenue*, 689 S.W.2d 45, 49 (Mo. banc 1985). Leuckel also argues that when she smoked marijuana, she was under considerable stress from an abusive domestic relationship, and that the circumstances precipitated a brief lapse in judgment. But those circumstances are for the Board to consider when it determines the appropriate degree of discipline. Section 335.066.3. In a case such as this one, our role is only to decide whether cause for discipline exists. Section 621.110, RSMo 2000.



### **Summary**

Lueckel is subject to discipline under § 335.066.2(1) and (14).

SO ORDERED on February 20, 2015.

*\s\ Karen A. Winn*

KAREN A. WINN

Commissioner